Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1977

No. 77-1135

ROBERT BROWN,

Petitioner,

—against—

MELVYN TANENBAUM, a Judge of the County Court of the State of New York, Suffolk County, HENRY O'BRIEN, District Attorney of Suffolk County, BENJAMIN WARD, Commissioner of Corrections of the State of New York, and the SHERIFF OF THE COUNTY OF SUFFOLK,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

The petitioner seeks a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the affirmance of the denial of his application for a writ of habeas corpus. If accepted by this Court, this case would present the question of whether the holding of *Lefkowitz* v. *Newsome* * has been effectively overruled by *Stone* v. *Powell* ** in the context of an obscenity case in

* 420 U.S. 283 (1975)
** 428 U.S. 465 (1976)

which all Fourth Amendment considerations are inextricably linked to rights secured by the First Amendment. The courts below denied to the petitioner federal collateral review of the obscenity *vel non* of the materials upon which his conviction was based, and in doing so decided, incorrectly we think, an important question of federal law which has not been, but should be, settled by this Court.

Opinions Below

The opinion of the United States District Court for the Eastern District of New York (George C. Pratt, J.) has not yet been reported. (See, Appendix A, *infra.*) The United States Court of Appeals for the Second Circuit affirmed upon the opinion of the District Court. (See, Appendix B, *infra.*)

Jurisdictional Statement

The decree of the Court of Appeals was dated and filed January 16, 1978. Jurisdiction to review it is conferred upon this Court by 28 U.S.C. § 1254(1).

Question Presented

Whether a state defendant, convicted upon his plea of guilty in a obscenity case, is entitled to federal collateral review on the issue of obscenity *vel non* when, as acknowledged by the court of conviction, state law preserves the issue for direct appeal.

Constitutional and Statutory Provisions at Issue

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

The Fourth Amendment to the Constitution of the United States provides in part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . .

The Fourteenth Amendment to the Constitution of the United States provides in part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Subdivisions a and c3 of Section 2241 of Title 28 of United States Code provide in pertinent part:

> Writs of habeas corpus may be granted by the . . . District Courts . . .
>
> The writ of habeas corpus shall not extend to a prisoner unless——
>
> He is in custody in violation of the Constitution or laws . . . of the United States

Section 690.10 of the Criminal Procedure Law of New York provides in pertinent part:

> Personal property is subject to seizure pursuant to a search warrant if there is reasonable cause to believe that it: . . .

2. Is unlawfully possessed; or

3. Has been used, or is possessed for the purpose of being used, to commit or conceal the commission of an offense; or

4. Constitutes evidence or tends to demonstrate that an offense was committed or that a particular person participated in the commission of an offense. (Consolidated Laws of New York, Book 11A, McKinney's 1971)

Section 710.20 of the Criminal Procedure Law of New York provides in part:

> Upon motion of a defendant who (a) is aggrieved by unlawful or improper acquisition of evidence and has reasonable cause to believe that such may be offered against him in a criminal action, . . . a court may, under circumstances prescribed in this article, order that such evidence be suppressed or excluded upon the ground that it:
>
> 1. Consists of tangible property obtained by means of an unlawful search and seizure under circumstances precluding admissibility thereof in a criminal action against such defendant; . . . (Consolidated Laws of New York, Book 11A, McKinney's 1971)

Subdivision 2 of Section 710.70 of the Criminal Procedure Law of New York provides:

> An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty. (Consolidated Laws of New York, Book 11-A, McKinney's 1971)

Statement of the Case

On March 22, 1972, Judge Frank L. Gates of the County Court of Suffolk County, New York, was presented with a number of magazines. After examining them *ex parte*, he concluded that they were obscene and signed a warrant authorizing the seizure of six copies of each volume from the premises of the petitioner's corporation. Acting under the warrant, officers seized the described material. It was later presented to a Suffolk County grand jury which thereupon returned a 207 count indictment charging the petitioner and others with the crimes of conspiracy in the third and fourth degrees * and obscenity in the first and second degrees.**

When proceedings on the indictment began, the petitioner immediately moved to controvert the warrant and to suppress the material seized under its authority, *inter alia*, on the ground that "there was no basis in fact or in law to declare the seized merchandise as 'obscene.'" This application was denied without a hearing.

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* Penal Law of New York Sections 105.00 & 105.05 (Consolidated Laws of New York, Book 39, McKinney's 1967).

** Article 235 of the Penal Law, *supra*, provides in pertinent part: "A person is guilty of obscenity in the first degree when, knowing its content and character, he wholesale promotes or possesses with intent to wholesale promote, any obscene material." (Sec. 235.06); "'Wholesale promote' means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate or to offer or agree to do the same purposes of resale." (Sec. 235.00 [5]); "A person is guilty of obscenity in the second degree when, knowing its content and character, he: 1. Promotes, or possesses with intent to promote, any obscene material. . ." (Sec. 255.05); "'Promote' means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same. (Sec. 235.00[4])

The petitioner followed with a series of motions. He unsuccessfully attacked the constitutionality of New York's former obscenity statute.* He also sought dismissal of the indictment on the ground that, as a matter of law, the magazines in question were not obscene. Summarily denying each of these motions, Judge Pierre G. Lundberg of the County Court declined to examine the magazines himself, relying instead on Judge Gates' preliminary finding of obscenity.

Subsequently, expressing the fear that the then newly decided case of *Matter of Miranda* v. *Isseks* ** might foreclose appellate review of the sufficiency of the grand jury evidence, petitioner moved to reargue his previous motion to have the court inspect that evidence. Judge Lundberg denied the motion while offering the petitioner the following assurance on the question of reviewability:

> Neither the Criminal Procedure Law nor *Matter of Miranda* v. *Isseks*, 41 App.Div.2d 176, prevent [sic] the defendants from entering pleas of guilty and thereafter appealing this Court's prior determination based on the language of the C.P.L. *and* the prior judicial determination by Judge Gates. (Emphasis in original.)

Later in the course of the proceedings, the petitioner moved for a hearing on the question of obscenity. Over the District Attorney's objection, the County Court (now

* Section 235.00(1) of the Penal Law of New York (Consolidated Laws of New York, Book 39, McKinney's 1967) (repealed L. 1974, c.989). That statute, following the *Roth-Memoirs* formulation, prohibited a finding of obscenity unless the material was "utterly without redeeming social value." (See *Roth* v. *United States*, 354 U.S. 476 [1957]; *Memoirs* v. *Massachusetts*, 383 U.S. 413 [1966].)

** 41 App. Div. 2d 176, 341 N.Y.S. 2d 541 (2nd Dept. 1973)

per respondent Melvyn Tanenbaum, J.) agreed to entertain the motion, but only as an application for an inspection of the grand jury evidence.* Judge Tanenbaum invited and received argument on the obscenity question. He then examined the publications *in camera* and held them sufficient to sustain the indictment.**

Thereafter, the petitioner agreed to plead guilty to two counts of the indictment—one charging the felony of obscenity in the first degree, the other charging obscenity in the second degree, a misdemeanor. The counts related to two different magazines.

At his allocution, the petitioner admitted what he had never denied—that, knowing the content of the two magazines, he had accepted orders for them and had shipped them to storekeepers for resale. He insisted, however, that, at the time he sold the magazines, he did not know or believe that they were obscene. He maintained that, had he believed otherwise, he would not have sold them. Under the court's questioning, the petitioner stated that he had now come to understand that the two magazines were obscene under the law controlling at the time of their sale.

* The District Attorney's opposition to the hearing followed by over two years this Court's holding that an accused in an obscenity case must have available to him a prompt, pre-trial, adversarial proceeding to test the obscenity *vel non* of the materials seized. *Heller* v. *New York*, 413 U.S. 483 (1973).

** When Judge Tanenbaum announced his decision, he was asked by counsel "to attach to the record, in the event an appeal is necessary, as a sealed exhibit, the minutes of the instructions given to the Grand Jury. I think we're entitled to that to appear in the record." The judge replied: "I think that will happen as a matter of law anyway. If that becomes an issue the Appellate Division will call for the minutes, I'm sure." Counsel then announced, "Let me just state for the record, in the event of a conviction, that will be an issue. So that the integrity of the minutes should be preserved."

The plea was accepted and the petitioner was subsequently sentenced to serve concurrent terms of imprisonment of three years on the felony count and of sixty days on the misdemeanor. No promise as to sentence had preceded the plea.

The petitioner appealed from the judgment to the Appellate Division, Second Department. Among the arguments raised in that court was that "[t]he trial court erred in refusing to declare the publications which were the subject of the indictment not obscene as a matter of law and thereupon, to dismiss the indictment . . ." The Appellate Division affirmed the judgment without opinion. Leave to appeal to the Court of Appeals was denied by Chief Judge Charles D. Breitel.

The petitioner subsequently sought habeas corpus relief in the United States District Court for the Eastern District of New York. He contended that the statute under which he was convicted was unconstitutional in that neither on its face nor as construed prior to the acts charged did it meet the specificity requirements of *Miller*.* The petitioner also maintained that his conviction could not stand because it was based upon magazines which, as a matter of constitutional law, were not obscene.

The District Court (per Pratt, J.) dismissed the petition holding that the statute was constitutional and that federal habeas corpus review of the obscenity question was foreclosed by the petitioner's guilty plea. The Court of Appeals affirmed on the opinion of the District Court.

The petitioner here seeks review of the narrow question of whether access to federal review of the obscenity

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* *Miller* v. *California*, 413 U.S. 15(1973)

vel non of the magazines was improperly denied him. He contends that, by complying with New York's statutory scheme which preserved the issue for direct review in the state appellate courts, he ensured that federal collateral review would likewise be available to him. Moreover, the petitioner submits that the question presented is an important one, as yet unsettled by this Court, involving the availability of federal habeas corpus relief in state cases which lie at the crossroads of the First and Fourth Amendments.

ARGUMENT

Where a state statute affords the right to appeal from the denial of a suppression motion even after a plea of guilty, federal collateral review of the issue is available notwithstanding *Stone* v. *Powell* when the suppression motion is grounded upon an alleged violation of First Amendment rights. In ruling to the contrary, the Court below improperly extended the reach of *Stone* v. *Powell* and effectively overruled *Lefkowitz* v. *Newsome*. An important question of federal law is therefore presented upon which this Court should speak.

In *Lefkowitz* v. *Newsome*, 420 U.S. 283 (1975), this Court held that "when state law permits a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues, the defendant is not foreclosed from pursuing those constitutional claims in a federal habeas corpus proceeding." (*Id.* at 293.) Indeed, speaking of the predecessors of the very provisions in issue here, the Court observed that "[f]or a New York defendant whose basic defense consists of one of those constitutional claims [enumerated in the statutes] and who has already lost a pretrial motion to suppress

based on that claim, there is no practical difference in terms of appellate review between going to trial and pleading guilty." (*Id.* at 289.)

The petitioner here, also a New York defendant, followed the statutory procedure in much the way Newsome had, and with the same result. His suppression motion was grounded on the contention that as a matter of law the magazines in question were not obscene. If he was correct, and we maintain that he was, he was entitled to the traditional Fourth Amendment remedy of suppression even though his claim bore much closer relation to the First Amendment than to the Fourth.

Publications protected by the First Amendment are neither contraband nor, in the context of this case, evidence of a crime. Therefore they cannot be the object of a search warrant. (See, CPL § 690.10, *supra.*) A warrant directing their seizure is defective, and material seized solely under its authority is obtained unlawfully and must be suppressed. (See, CPL § 710.20 [1].)

Hence, a statute framed in Fourth Amendment terms operates to protect First Amendment rights in a case where the interests served by both are inseparably interwoven. It is because traditional Fourth Amendment language and remedies are involved, that, at first blush, the principles of *Stone* v. *Powell** seem to be implicated. It is because the essence of petitioner's claim involves only First Amendment rights that the holding of that case should not apply.

Having made and lost a motion to suppress, the petitioner's right to review of the claim on direct appeal was guaranteed by statute (CPL § 710.70[2]) just as

* 428 U.S. 465 (1965).

Newsome's had been.* And, like Newsome, the petitioner in fact pressed his claim on appeal from the judgment. Petitioner's case differs from Newsome's, however, not in the procedure by which the claim was preserved, but in the nature and substance of the claim itself.

Unlike Newsome, the petitioner does not ground his contention upon a judge-made rule which has as its function "the exclusion of truth from the factfinding process." (*Stone* v. *Powell, supra,* at 496, Burger, Ch.J., concurring). Nor does he ask the federal courts "to redetermine an issue that has no bearing on the basic justice of his incarceration." (*Id.* at 491, n.31).

Instead, he seeks review of a claim that goes to the very heart of the State's power to impose punishment upon him. Plainly, if the obscenity question was incorrectly resolved in the State court, then petitioner is not guilty and faces criminal sanctions for exercising his First Amendment rights.**

* Judge Lundberg's decision simply acknowledged that fact. He had declined to view the magazines in the context of a motion to inspect grand jury evidence, choosing instead to rely on the preliminary determination of Judge Gates. Judge Lundberg quite correctly recognized that, since the Gates obscenity ruling was subject to appellate review even after a plea of guilty, so too would be the underlying merit of his own orders relating to the same question. Moreover, even absent the statutory provisions involved, Judge Lundberg's order, unchallenged by the District Attorney, independently constituted an express reservation of the obscenity issue preserving it for appeal. See, *e.g., United States* v. *Zudick,* 523 F.2d 848, 851-852 (3rd Cir. 1975); *United States* v. *Mann,* 451 F.2d 346, 347 (2nd Cir. 1971); *United States* v. *Doyle,* 348 F.2d 715 (2nd Cir. 1965); *United States* v. *Consiglio,* 391 F.Supp. 564, 569 (D. Conn. 1975).

** The petitioner's acknowledgment of obscenity made at his allocution does not detract from the strength of his argument here. His statement has no more bearing on his present contention than does his repeated insistence that at the time he

[Footnote continued on following page]

The petitioner moved to suppress on proper grounds and was entitled to rely on the statute that preserved his right to appeal even after a guilty plea. The very existence of the statute made it unreasonable for the prosecution to entertain an expectation of finality when the plea was offered—and, if the statute did not alert the prosecution to the possibility of appeal, Judge Lundberg's order surely must have.*

The petitioner chose to forego the long and expensive process of trial on the obscenity issue, opting instead to present it as a question of law at a higher level. He did so with the assurance of state law and of the court of conviction that he would have that opportunity. His decision was not extraordinary since ". . . obscenity *vel non* is not an issue of fact with respect to which the jury's finding has its usual conclusive effect. It is rather an issue of constitutional law that must eventually be decided by the court." *United States* v. *A Motion Picture Film Entitled "I Am Curious—Yellow,"* 404 F.2d 196, 199 (2nd Cir. 1968). See, also, *Jenkins* v. *Georgia*, 418 U.S. 153 (1974).

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sold the magazines he did not believe them to be obscene. It is settled that the personal belief of an accused as to the obscenity of the materials he sells is not relevant to his guilt or innocence. See, *Hamling* v. *United States*, 418 U.S. 87, 119-124 (1974). Moreover, the general quality and effect of a guilty plea in an obscenity case differs from the ordinary since an erroneous ruling on the question of obscenity *vel non* is "logically inconsistent with the valid establishment of . . . guilt," and is therefore hardly rendered "irrelevant" by a guilty plea. See, *Menna* v. *New York*, 423 U.S. 61, 62 n. 2 (1975).

* It is of no consequence to this petition that the opinion of the District Court upon which the Circuit Court affirmed addressed only the question of whether Judge Lundberg's order established, in and of itself, a so-called conditional plea. The theory that the obscenity question was preserved by statute as well was fully briefed in the Circuit Court and was answered on the merits by the District Attorney. It therefore raises simply a question of law which this Court may certainly address. See, *e.g.*, *Giordenello* v. *United States*, 357 U.S. 480, 484-485 n.2 (1957); *Sabbath* v. *United States*, 391 U.S. 585, 588 n.1 (1968).

The petitioner duly presented his claim in the State appellate courts. Nothing in the nature of his claim, nothing in the statute by which it was preserved, and, more important, nothing in the policy underlying *Stone* v. *Powell*, *supra*, suggests that access to the federal courts should have been refused him.

In denying federal review, the Court of Appeals has decided an important issue of far-reaching effect. It has held that *Stone* v. *Powell*, *supra*, bars habeas corpus relief whenever a petitioner's claim relates in any way to the Fourth Amendment, and that *Lefkowitz* v. *Newsome*, *supra*, has been effectively overruled. Because these issues are of great moment, this Court should agree to review them and grant this petition.

CONCLUSION

For all of the foregoing reasons, the petitioner's application for a writ of certiorari should be granted.

Dated: Brooklyn, New York
February 8, 1978

Respectfully submitted,

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APPENDIX

APPENDIX A

Memorandum and Order

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket No. 77 C 1081

ROBERT BROWN,

Petitioner,

—against—

MELVYN TANENBAUM, et al.,

Respondents.

PRATT, J.:

By habeas corpus, 28 U.S.C. § 2254, petitioner seeks relief from a judgment entered April 2, 1976 in the County Court of the State of New York, Suffolk County, convicting him, upon his plea of guilty, of the crimes of obscenity in the first and second degrees, and sentencing him to serve concurrent terms of imprisonment of three years and of sixty days, respectively. His conviction was affirmed without opinion by the Appellate Division, Second Department, on February 13, 1977. On April 6, 1977 leave to appeal to the New York Court of Appeals was denied by Chief Judge Breitel.

For the reasons set forth below, petitioner's request for habeas corpus relief is denied and the petition is dismissed.

I.

On April 28, 1972 a Suffolk County grand jury returned an indictment charging the petitioner and others,

in 207 counts, with the crimes of conspiracy in the third and fourth degrees and obscenity in the first and second degrees. On November 29, 1972, petitioner's counsel made an omnibus motion seeking, *inter alia*, inspection of the grand jury minutes and dismissal of the indictment on the grounds that the evidence before the grand jury was not legally sufficient to sustain the indictment. In its decision denying this motion, the court noted:

> The titles [of the magazines] included in this multi-count indictment are the same titles included in the search warrant issued by this Court on March 22, 1972 (Hon. F. L. Gates). After scrutinizing each of said publications, Judge Gates made a preliminary determination that each of said publications is obscene before issuing the warrant. * * * This resolves in my mind the question—whether the titles included in counts 2-207, inclusive, are obscene pursuant to Penal Law § 235.00. The Grand Jury may find on the basis of the material itself that it contains all the statutory elements of being obscene including but not limited to the lack of redeeming social value.
>
> *People* v. *Overstock Book Co., Inc.*, No. 555/72, Mem. at 2 (Suffolk County Ct., Mar. 8, 1973).

Thereafter, petitioner again moved to dismiss the indictment on the grounds, *inter alia*, that the material was not obscene as a matter of law and that the obscenity statutes were unconstitutional. This motion was summarily denied on May 8, 1973. By motion dated May 2, 1973, petitioner sought reargument of the November 29, 1972 motion to inspect the grand jury minutes and to dismiss for legal insufficiency. In its decision denying the motion to reargue, the court concluded:

> Neither the Criminal Procedure Law nor Matter of Miranda v. Isseks, 41 App. Div. 2d 186, prevent [sic] the defendants from entering pleas of guilty and thereafter appealing this Court's prior determination based on the language of the C.P.L. *and* the prior judicial determination by Judge Gates.
>
> *People* v. *Overstock Book Co., Inc.*, No. 555-72, Mem. (Suffolk County Cp., May 23, 1973) (emphasis in original).

Finally, "after intensive consultation with his counsel", Petition ¶ 15, petitioner entered pleas of guilty to two counts—one charging a felony, one a misdemeanor—in full satisfaction of the 207 count indictment.

II.

In support of his application for habeas corpus relief, petitioner contends (1) that the controlling statute under which he was convicted, New York Penal Law ¶ 235.000(1), which was repealed by Laws of 1974, Ch. 989, was constitutionally invalid and, (2) that as a matter of law the materials underlying his convictions were not obscene. Recognizing, however, that one who enters a counseled, voluntary guilty plea generally "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea", *Tollett* v. *Henderson*, 411 U.S. 256, 267 (1973), petitioner first seeks to show that his two contentions on the merits are properly cognizable in this habeas corpus proceeding.

III.

A federal court in a habeas corpus proceeding may not take cognizance of petitioner's contention that as a matter of law the materials underlying his conviction were not obscene if his counseled guilty plea constitutes

a waiver of this issue. See *Menna* v. *New York*, 423 U.S. 61 (1975); *Tollett* v. *Henderson, supra.* A widely recognized exception to the waiver rule of *Menna* and *Tollett* is that a plea entered upon a clear understanding that it will not foreclose further judicial review of specifically reserved issues of law will not operate as a bar to such further review. See *Lefkowitz* v. *Newsome*, 420 U.S. 283 (1975); *United States* v. *Zudick*, 523 F.2d 848 (CA 3, 1975); *United States* v. *Mann*, 451 F.2d 346 (CA 2, 1971).

Petitioner claims that the exception to the waiver rule applies here. He points to the Suffolk County Court's language in denying his motion to reargue on May 23, 1973 and maintains that this statement quoted *supra* had put all parties on notice that the issue of the sufficiency of the grand jury evidence, and, hence of the obscenity *vel non* of the magazines in question, would be preserved for review even in the face of the entry of a guilty plea. According to petitioner, "what is in issue is whether his [the court's] unambiguous statement plausibly gave rise to an expectation by all concerned that the question of the sufficiency of the evidence would survive a plea of guilty. Cf. *Lefkowitz* v. *Newsome*, 420 U.S. 283, 290 (1975)." Reply Brief for Petitioner at 5-6.

IV.

Petitioner's reliance on this May 23, 1973 statement as evidence of a conditional guilty plea is without merit. First, the court's May 23 decision must be read in the context in which it was made. In the affidavit supporting petitioner's motion to reargue, counsel had urged in connection with the inspection of the grand jury minutes that a guilty verdict after trial would preclude an appeal based on the legal insufficiency of the evidence presented

to the grand jury. It was in response to this argument that the court correctly stated that such an appeal was precluded by neither the Criminal Procedure Law nor by the cited case, the correct law being that a properly framed guilty plea could be entered which preserved the reviewability of the obscenity *vel non* of the magazines on appeal. What the court did was to suggest a guilty plea as a solution to counsel's point that a trial would preclude his objection to the grand jury's action. The court did not attempt to suggest the manner in which such a guilty plea should be entered.

Second, it is reasonable to assume that, should the petitioner take the suggested solution, the court envisioned a clearly conditional plea expressly reserving these issues for appellate review. *See Lefkowitz* v. *Newsome, supra.* In the instant case, however, the guilty plea actually entered was painstakingly unequivocal and unconditional. See Petition, Ex. F.

As explained by the Supreme Court in *Lefkowitz* v. *Newsome, supra*:

> Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained.
>
> New York, however, has chosen not to treat a guilty plea as * * * a "break in the chain of events" with regard to certain claims raised in pre-trial proceedings * * *. The guilty plea operates simply as a procedure by which the constitutional issues can be litigated without the necessity of going through the time and effort of conducting a trial, the result of which is foreordained if the

> constitutional claim is invalid. The plea is entered with the clear understanding and expectation by the State, the defendant, and the Courts that it will not foreclose judicial review of the merits of the alleged constitutional violations.
>
> 420 U.S. at 289-90.

There was no such "clear understanding and expectation" among the prosecutor, the judge, and the petitioner here. Neither the trial judge, the judges of the New York Appellate Division, nor one judge of the New York Court of Appeals could find such a clear understanding and expectation of a conditional plea; the prosecutor, an alleged party to the agreement, denies its existence; and the record of the plea proceedings is completely barren of any mention of a clear, express, conditional plea which reserved review of the obscenity *vel non* of the magazines for this or any other court.

V.

Petitioner also contends that the statute under which he was convicted was constitutionally invalid. Unlike the issue of the obscenity *vel non* of the magazines, such a contention is directly reviewable in this federal habeas corpus proceeding. However, like petitioner's attempt to raise the issue of the obscenity *vel non* of the magazines, his contention is without merit.

When the indictment was returned in 1972, New York's controlling obscenity statute, admittedly consistent with the then prevailing obscenity test established in *Roth* v. *United States*, 354 U.S. 476 (1957), and *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966), provided:

> Any material or performance is "obscene" if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism and (b) it goes substantially beyond customary limits of candor in describing or representing such matters and (c) it is utterly without redeeming social value.
>
> N.Y. Penal Law § 235.00(1), *repealed*, Laws of 1974, Ch. 989.

On June 21, 1973, however, the Supreme Court decided *Miller* v. *California*, 413 U.S. 15 (1973), which vacated a conviction obtained under a California obscenity statute similar to New York's, and rejected the *Roth-Memoirs* test. The Court held that the test for obscenity would thereafter be:

> (a) whether the "average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest * * *, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Id.* at 24.

Two days after the *Miller* decision, the Supreme Court vacated a judgment obtained under N.Y. Penal Law § 235.00 and remanded the case to the New York Court of Appeals for reconsideration in light of *Miller*. On remand, the New York court construed its statute as being limited to "offensive depictions of ultimate sexual acts, masturbation, excretory functions, lewd genital exhibiton, i.e., exactly that sort of thing described in the

Miller opinion * * *." *People* v. *Heller*, 33 N.Y.2d 314, 328 (1973). In short, the court of appeals held that the then existing statute "more than complied with the *Miller* limits as written and construed." *Id.* at 331.

Petitioner argues that the statute under which he was convicted was unconstitutional because it did not meet the specificity requirements announced in *Miller*, and that the subsequent judicial construction offered in *Heller*, published after the commission of the acts charged in the indictment, cannot be retroactively applied to avoid its constitutional deficiency. But the New York Court of Appeals did not legislate. All it did in *Heller* was review the long line of pre-*Miller* cases construing § 235.00 and determine that the statute had never been construed with less specificity than *Miller* required. Since the statute had always complied with the *Miller* specificity standards, § 235.00 gave constitutionally fair notice of the conduct proscribed and, as applied to petitioner, did not unexpectedly make criminal that which was not previously thought to be criminal. *See Ward* v. *Illinois*, 45 U.S.L.W. 4623 (1977); *United States* v. *Hamling*, 418 U.S. 87 (1974).

Pre-*Miller* construction of § 235.00 afforded defendant adequate notice that his conduct was proscribed, *compare, e.g.*, Petitioner's Exhibit "Young Boys and Oral Sex" *with* materials held to be obscene in *People* v. *G.I. Distributors, Inc.*, 20 N.Y.2d 104 (1967), and one federal court has already found tenable *Heller's* holding that § 235.00 as construed always embodied the constitutionally sufficient definition of obscenity. See *DeSalvo* v. *Codd*, 386 F.Supp. 1293, 1300 (S.D.N.Y. 1974) (3-judge court). Thus, the interpretation given to § 235.00 in *Heller* provided the same "clarifying gloss" found acceptable in *Hamling* v. *United States*, *supra*, and, petitioner's assertion to the contrary notwithstanding, did not constitute an unconstitutional *ex post facto* application.

VI.

Accordingly, petitioner's request for federal habeas corpus relief is denied and the petition is dismissed. The stay of execution of petitioner's sentence ordered by the undersigned will, therefore, be vacated 10 days after the filing of this memorandum and order. Certificate of Probable Cause is issued.

SO ORDERED.

Dated: Westbury, New York
October 19, 1977.

/s/ GEORGE C. PRATT

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GEORGE C. PRATT
U.S. District Judge

APPENDIX B

Order Dated January 16, 1978

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-2130

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of January, one thousand nine hundred and seventy-eight.

Present: HONORABLE WILFRED FEINBERG
HONORABLE JAMES L. OAKES
Circuit Judges

HONORABLE INZER B. WYATT
District Judge

ROBERT BROWN,
Petitioner-Appellant,

—against—

MELVYN TANENBAUM, a Judge of the County Court of the State of New York, Suffolk County, HENRY O'BRIEN, District Attorney of Suffolk County, BENJAMIN WARD, Commissioner of Correction of the State of New York, and the SHERIFF OF THE COUNTY OF SUFFOLK,
Respondents-Appellees.

Appeal from the United States District Court for the Eastern District of New York

Appendix B—Order Dated January 16, 1978

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion of Judge Pratt, dated October 19, 1977.

(Signed) WILFRED FEINBERG
(Signed) JAMES L. OAKES
Circuit Judges
(Signed) INZER B. WYATT
District Judge